

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF)
RICHERTS' SONS, INC. and)
HOWARD S. WRIGHT CONSTRUCTION)
COMPANY,)
Appellants,)
v.)
PUGET SOUND AIR POLLUTION)
CONTROL AGENCY,)
Respondent.)

PCHB Nos. 947 and 947-A

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

These consolidated matters, the appeals of four \$250 civil penalties for alleged open burning violations came before the Pollution Control Hearings Board (Chris Smith, Chairman, and Walt Woodward) as a formal hearing in the Board's offices at Lacey on May 5, 1976.

Appellant Richerts' Sons, Inc. appeared through its attorney, Dennis J. Perkins; appellant Howard S. Wright Construction Company through its attorney, Richard E. Bangert, and respondent through its counsel, Keith D. McGoffin. Eugene E. Barker, Olympia court reporter,

1 II

2 In September, 1975, Howard S. Wright Construction Company was
3 performing certain work for the United States Navy at the Navy's Trident
4 submarine base at Bangor, Kitsap County, in the jurisdictional area of
5 respondent. Associated with Wright as a sub-contractor for land clearing
6 was Richerts' Sons, Inc. The Navy required that land clearing debris
7 not be burned on the base.

8 III

9 On September 23, 1975, an inspector on respondent's staff saw
10 several large truckloads of natural vegetation debris being hauled out
11 of Gate 12 of the Navy base to a nearby cleared area on private property
12 owned by John W. Whitford. The inspector ascertained that the debris
13 was from a Howard S. Wright Construction Company project site being
14 cleared by Richerts' Sons, Inc.

15 The debris was arranged in two separate large piles. The location
16 of the two piles was about one-quarter mile north of property also
17 owned by Mr. Whitford, on which he has developed and was continuing to
18 develop a mobile home park. Throughout this property to the south of
19 the two large piles containing debris from the Navy base Mr. Whitford
20 also was clearing land (see Exhibit A-1). On this property to the south,
21 Mr. Whitford had some ten piles of natural vegetation debris, all of
22 them smaller than the two piles containing Navy base debris. Mr. Whitford
23 also added some of his own land clearing debris to the two piles
24 containing Navy base material.

IV

The inspector, concerned about the provision of Section 1.07(nn)

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 of respondent's Regulation I as it might apply to the transported Navy
2 debris and to Section 4.02 of respondent's Regulation I if the piles
3 were burned, contacted Mr. Whitford on September 25, 1975 and informed
4 him of Regulation I and of enforcement consequences if the piles were
5 burned without first securing a variance from respondent.

6 V

7 On September 25, 1975, the inspector also contacted by telephone
8 the general superintendent of Howard S. Wright Construction Company and
9 gave him the same general warning which had been given to Mr. Whitford.

10 VI

11 On October 2, 1975, at a meeting in a restaurant at Silverdale,
12 the inspector also gave the same general warning to an official of
13 Richerts' Sons, Inc.

14 VII

15 On October 1, 1975, respondent notified Howard S. Wright
16 Construction Company in writing (Exhibit R-6) that burning on private
17 land of the transported Navy land clearing debris would be an "unlawful
18 operation and subject to enforcement action" by respondent.

19 On October 3, 1975, respondent sent an identical letter (Exhibit
20 R-7) to Richerts' Sons, Inc.

21 VIII

22 The inspector also contacted the area supervisor of the State
23 Department of Natural Resources (DNR). The supervisor agreed that DNR
24 would issue no outdoor burning permits for the two large piles containing
25 transported Navy debris until a variance for same had been obtained
26 from respondent.

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

IX

On October 9, 1975, a forest technician on the staff of the State Department of Natural Resources, pursuant to RCW 76.04.170, issued to Mr. Whitford a burning permit for the purposes of "forest fire hazard abatement" and "home premises debris disposal."

Mr. Whitford testified he understood the permit (Exhibit R-22) covered not only the some ten smaller debris piles on his mobile home park but also the two larger piles containing Navy debris and located one-quarter mile north of the mobile home site.

The forest technician testified the permit was issued only to cover three of the smaller piles on the mobile home park site.

While the permit lacks detail as to its limitations and while it contains an error in legal description not noted either by the forest technician or by Mr. Whitford at the time of issuance, this Board finds that the permit was limited to three mobile home park piles and did not include the two larger piles containing Navy debris. We make this finding for the following reasons:

(a) On its face, the permit is conditioned to include certain fire safety precautions, such as "20 gallons (of water) and 2 buckets," which would be useless in controlling fires of such dimension as the two large piles containing the Navy debris.

(b) On its face, the permit states that it was issued "subject to air quality control."

(c) Mr. Whitford and the forest technician sat in a car near an entrance road to the mobile home park when the permit was prepared. The only debris piles visible were those of the mobile home park. The forest

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 technician saw two piles, Mr. Whitford indicated there was a third pile
2 he wished to find and the technician left the car, walked a short
3 distance in a mobile home park road to inspect it.

4 (d) The forest technician knew of the two larger piles containing
5 Navy debris and knew that his Department had agreed not to issue
6 burning permits for them prior to issuance by respondent of a variance
7 for them.

8 (e) The "local landmarks" section of the permit is filled out for
9 the intersection of public roads nearest the mobile home park; that
10 intersection is three-quarters of a mile south of the location of the
11 two piles containing Navy debris. The forest technician testified that
12 had he included those two piles in the permit he would have employed
13 "Gate 12" of the Bangor base in the "local landmarks" section.

14 X

15 On October 17, 1975, at 9:20 p.m., the inspector went to the site
16 of the two large piles containing Navy debris after being informed by
17 the chief of a nearby fire district that the piles had been ignited.
18 The inspector saw flames consuming one pile 60 feet by 80 feet by ten
19 feet high and a second pile 40 feet by 120 feet by 15 feet high. The
20 piles were separated by a space of 20 feet. Mr. Whitford and another
21 person were in attendance. Later, while the inspector was present, an
22 official of Richerts' Sons, Inc. arrived.

23 The inspector informed the Richerts' official that the fires were a
24 violation of respondent's Regulation I. The inspector did not request
25 that the fires be extinguished. No efforts were made to extinguish
26 the fires. The inspector left.

27 FINAL FINDINGS OF FACT

CONCLUSIONS OF LAW AND ORDER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

On October 18, 1975, at 9:20 a.m., the inspector returned to the site. Each pile, which had been consolidated by the use of a tractor, was about three-fourths consumed. The separate piles were smoldering and each one was emitting heavy billows of opaque smoke. The inspector saw no person in attendance and saw no evidence of any attempt to extinguish the fires.

XII

Subsequently, respondent served on the United States Navy, Howard S. Wright Construction Company, Richerts' Sons, Inc., and Mr. Whitford Notices of Violation Nos. 10715 and 10716, which cited Section 9.02 of respondent's Regulation I, and Notices of Civil Penalty Nos. 2588 and 2589, each in the amount of \$250, in connection with the two fires observed on October 17, 1975, and Notices of Violation Nos. 10717 and 10718, which cited Section 9.02, and Notices of Civil Penalty Nos. 2590 and 2591, each in the amount of \$250, in connection with the two fires observed on October 18, 1975.

XIII

Howard S. Wright Construction Company and Richerts' Sons, Inc. made timely appeals to this Board of Notices of Civil Penalties Nos. 2588, 2589, 2590 and 2591. They are the subjects of this matter.

XIV

Any Conclusion of Law hereinafter recited which is deemed to be a Finding of Fact is adopted herewith as same.

From these Findings, the Pollution Control Hearings Board comes to these

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 CONCLUSIONS OF LAW

2 I

3 The ultimate issue in these instant matters is whether there were
4 one or more violations of Section 9.02 of respondent's Regulation I.
5 However, this Board first must determine whether appellants were operating
6 under a valid DNR permit. That preliminary step is required because of
7 our Supreme Court's recent decision in Simpson Timber Co. v. Olynatic
8 Air Pollution Control Authority and DNR, No. 43871 (Sup. Ct., April 22,
9 1976).

10 II

11 Because of Finding of Fact I', we conclude that appellants did
12 not possess a DNR permit which covered or permitted in any way the
13 burning of the two large piles of transported Navy debris.

14 We wish to emphasize that we do not lightly come to that
15 conclusion. We reach it, in part at least, from a background,
16 accumulated in this Board's 21-year history, of having heard several
17 disputes involving regional air pollution control agencies (such as
18 respondent) and the DNR over jurisdiction in open burning incidents.
19 On occasion, this Board has found it necessary to criticize that it
20 found to be a regrettable lack of inter-government cooperation in
21 protection of the public from unwanted air contamination.

22 To the contrary in these instant matters, however, is the
23 refreshing fact that respondent and the DNR closely cooperated almost
24 from the moment that respondent's inspector first became concerned about
25 those two huge piles of transported debris being accumulated on
26 Mr. Whitford's property. We find the evidence to be overwhelming that

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND OPDIP

1 the DNR did not intend and did not, as a fact, grant any open burning
2 permit for those two piles of debris.

3 III

4 Having determined that respondent does have jurisdiction in these
5 matters, we now come to Section 9.02 of respondent's Regulation I. That
6 section is a maze of obfuscation but, with patience, its tangled skein
7 is not too difficult to unravel.

8 In these instant matters, Section 9.02 must be read with Section
9 1.07(nn), from which we learn that the burning of the two debris piles
10 of concern here did not qualify as "land clearing burning" because
11 the material had been transported; that is, they were not ignited on
12 the land on which the vegetation originated.

13 This definition, then, leaves the ignition of those two piles
14 under the general category of "other burning" covered in Section
15 9.02(d)(3), for which "prior written approval" must be obtained from
16 respondent.

17 We conclude that Section 9.02 does apply in these matters.

18 IV

19 Finally, then, we are left with determining whether the facts
20 demonstrate a violation, or violations, of Section 9.02.

21 They surely do. Respondent, the facts clearly show, bent over
22 backward to advise and warn appellants, not only orally but in writing,
23 that they would be in violation of Section 9.02 if those two piles were
24 ignited without a variance having been sought from respondent. But,
25 no variance was sought, and they were ignited. Appellants must bear the
26 consequences. They were in violation of Section 9.02 as cited in

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

1 Notices of Violation Nos. 10715, 10716, 10717 and 10718.

2 In this, I reject the argument of appellants that (a) only a
3 fire lane separated the two piles and that there really was only one
4 fire and only one violation and that (b) the violations noted on
5 October 18 were merely bootlegging continuations of violations already
6 cited for the previous day.

7 We conclude there were two violations properly cited in Notices
8 of Violation Nos. 10715 and 10716 for October 17. There were two burning
9 piles. To say they could have been amalgamated into one gigantic pile,
10 and thus have avoided one violation, is to surmise what respondent might
11 have directed in a variance, a process which appellants chose to ignore.

12 There also were two violations on October 18 as cited in Notices
13 of Violation Nos. 10717 and 10718. Not only does Section 3.29 of
14 respondent's Regulation I require that they be counted separately from
15 those noted on the previous day, but the evidence taken only too clear
16 there were real, bona fide air contamination violations at those two
17 piles on October 18; the billowing smoke of that day leaves no doubt.

18 V

19 Notices of Civil Penalty Nos. 2588, 2589, 2590 and 2591, although
20 each was in the sum of the maximum allowable amount which respondent
21 may levy for a civil penalty, are reasonable in view of the facts and
22 circumstances.

23 VI

24 Any Finding of Fact herein recited which is deemed to be a Conclusion
25 of Law is adopted herewith as same.

26 Therefore, the Pollution Control Hearings Board issues this

27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

ORDER

The appeals are denied and Notices of Civil Penalty Nos. 2588, 2589, 2590 and 2591 are sustained.

DONE at Lacey, Washington this 17th day of May, 1976.

POLLUTION CONTROL HEARINGS BOARD

Chris Smith
CHRIS SMITH, Chairman

Walt Woodward
WALT WOODWARD, Member